No. 711

FILED
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HAROLD B. WILLEY,

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1955

THE BOARD OF EDUCATION OF HILLSBORO, OHIO, a body corporate; MARVEL K. WILKIN, President, ELMER HEDGES, Vice President, WILFRED L. FAUL, WILLIAM L. LUKENS and JOHN HENRY BROWN, members of the Board of Education of Hillsboro, Ohio; PAUL L. UPP, Superintendent of Schools of Hillsboro,

Petitioners,

vs.

JOYCE MARIE CLEMONS, an infant, by GERTRUDE CLEMONS, her mother and next friend, DEBORAH K. ROLLINS, an infant, by NORMA ROLLINS, her mother and next friend, MYRA DARLINE CUMBERLAND, an infant, by ZELLA MAE CUMBERLAND, her mother and next friend, EVELYN MARIE STEWARD, VIRGINIA ANN STEWARD and CAROLYN LOUISE STEWARD, infants, by ELSIE STEWARD, their mother and next friend, DOROTHY MARIE CLEMONS, an infant, by ROXIE CLEMONS, her mother and next friend, on behalf of themselves and others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (AND APPENDIX)

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In The

SUPREME COURT OF THE UNITED STATES

THE BOARD OF EDUCATION OF HILLSBORO, OHIO, a body corporate, et al,

Petitioners

vs.

JOYCE MARIE CLEMONS, an infant, by GERTRUDE CLEMONS, her mother and next friend, et al,

Respondents.

Petition For a Writ of Certiorari to The United States Court of Appeals, for the Sixth Circuit

---

Petitioners (Defendants-Appellees below) The Board of Education of Hillsboro, Ohio, et al, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review a judgment of that Court entered January 5, 1956 (Rehearing Denied January 31, 1956) reversing a judgment of the United States District Court for the Southern District of Ohio (Judge Druffel).

(A)

OPINIONS OF THE COURTS BELOW

The opinions of the courts below are not reported officially or unofficially. Copies are appended hereto.

(B)

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

(I)

The judgment sought to be reviewed was dated and entered on January 5, 1956.

(II)

Rehearing was petitioned for to the court below on January 23, 1956, and an order denying rehearing (one Circuit Judge dissenting) was dated and entered on January 31, 1956. No order granting an extension of time within which to petition for certiorari has been requested or made.

(III)

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 62 Stat. 928, 28 U.S.C. § 1254, and in particular that portion thereof as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. * * *

(C)

THE QUESTIONS PRESENTED FOR REVIEW

—1—

Did the District Court *abuse its discretion* in judicially appraising the program of the Petitioner, Board of Educa-

tion of Hillsboro, Ohio, as constituting a good faith implementation of the constitutional principles declared by this Court in *Brown, et al,* v. *Board of Education of Topeka, et al,* (347 U.S. 483).

(The United States Court of Appeals for the Sixth Circuit *—with one Circuit Judge dissenting—*answered this question in the affirmative; the Petitioners contend it should have been answered in the negative.)

—2—

The District Court found as a fact, as the result of a judicial appraisal, that the program of complete integration adopted and being carried forward by the Petitioner, Board of Education of Hillsboro, Ohio, was in fact a "good faith" implementation of the abolishment of segregation; this program involved the building of two new schools and involved a one hundred percent accomplishment of integration by September 1, 1956, in a School District in which segregation had been substantially practiced for approximately ninety years. Was this finding of fact an abuse of judicial discretion?

(The United States Court of Appeals for the Sixth Circuit—*with one Circuit Judge dissenting*—answered this question in the affirmative; the Petitioners contend it should have been answered in the negative.)

(D)

CONSTITUTIONAL PROVISIONS, ETC.

This case does not involve any particular Constitutional provisions, treaties, statutes, ordinances or regulations. It does involve a serious question concerned with the implementation of the fundamenal principle set forth in *Brown* v. *Board of Education,* 347 U.S. 483; 349 U.S. 294.

(E)

STATEMENT OF THE CASE

The Board of Education of Hillsboro, Ohio, (which, with its members and Superintendent, constitute the Petitioners) is an administrative body corporate under Ohio law. It is charged with providing public elementary and high school education for residents of the Hillsboro School District; that District includes territorially the City of Hillsboro and substantial adjacent territory in Highland County, Ohio; that county being located in Southwestern Ohio, somewhat north of the Ohio River.

In the 1860's an elementary school called the Lincoln School was constructed by Petitioners' predecessors in the Hillsboro District. It was constructed as an elementary school for the exclusive use of Negro children. At and after that time there was at least one other elementary school in Hillsboro, Ohio, which was attended (at least up until quite recently) exclusively by White children (with possibly some isolated exceptions prior to 1940). For some years during the Nineteenth Century segregation in Ohio elementary schools was provided for by Ohio statute law, the last revision of the statute being Section 4008 Revised Statutes of Ohio (1886). That statute was repealed in 1887 (84 Ohio Laws 34) and shortly thereafter the Supreme Court of Ohio held in *Board of Education* v. *State*, 45 Ohio St. 555, that the repealer meant that "separate schools for colored children have been abolished, and no regulation can be made that does not apply to all children irrespective of race or color". Nonetheless, segregation de facto was practiced in Hillsboro beginning at least about 1864 and continuing through the years in what might be described a substantially complete fashion until well into the Twentieth Century. To this day the Lincoln School has been and

is attended exclusively by Negro children and until the school year commencing in 1954, no Negro children were admitted to any other elementary school in Hillsboro in grades 1 through 6 (with the isolated exceptions noted above).

Many years ago the Petitioner Board determined to proceed along the road of abolition of segregation and to eventually abolish it. As a first step and many years ago it was abolished in the high school administered by Petitioner so that for many years past, there has been in fact complete integration in the high school operated in Hillsboro. The second substantial step was taken in 1951. In that year (R. 37a) the seventh and eighth grades in Hillsboro were "integrated into the junior-senior high"; since 1951 integration has been a complete accomplishment not only in the high school but also in the last two grades of the grade schools—so that this case at all times involved only grades 1 through 6 of the elementary schools. In addition and at the same time that the seventh and eighth grades were integrated in 1951, the Superintendent of Schools opened the subject of complete integration with the Board (R. 37a)—it was informally decided that the appropriate accomplishment of that end was entwined with a school building program which necessitated obtaining the affirmative vote of the people of the District on a school bond issue; that the necessary bond issue would be asked for and that upon the accomplishment of the program "all children would be integrated". In four different elections the Petitioner-Board, seeking to accomplish its building program and also accomplish complete integration, had the question presented to the voters in the Hillsboro District and finally in 1953 the requested bond issue passed and the funds for the first time became available to accomplish the program.

At that time, 1953, there were in operation in Hillsboro three elementary schools; one was the Lincoln School attended exclusively by Negro children having a 1953-1954 enrollment of 70 pupils—all in the first through sixth grades. The second elementary school was the Washington School which had an enrollment of 421 pupils in that year; and the third was the Webster School which had an enrollment that year of 433. In that year the 854 in the Washington and Webster Schools were all White children. It was stipulated by the parties that in the 1953-1954 school year "the Washington and Webster Schools were overcrowded".

Contracts to carry out the school building program were promptly let. This building program involved building an addition to the Webster School and involved the gutting and rebuilding in its entirety of the Washington School. (R. 67a) The first order of business was the Webster project and not only had the contracts been let but that work was substantially going forward by September of 1954. By that same time architects had been employed to draw the plans for the Washington School work. The new Webster building was expected to be completed in 1955 and was completed on schedule. The Washington School work is expected to be completed by September, 1956, and is going according to schedule. The plan was to build the new Webster building first; and immediately thereafter the Washington School would be closed and the entire Washington-Webster elementary school bodies would be sent to the Webster School, occupying both the old and new buildings; the Washington School would be closed down during the work there and when the work was finished and the Washington School reopened, the old Webster School would be torn down and all eligible pupils in the elementary grades in Hillsboro would be assigned to the two new schools without regard to color in a one hundred percent

integration program. *This planned program will be in effect September 1, 1956.* It is important to note in connection with it that whereas the Petitioner-Board had an overcrowded situation on its hands in school year 1953-1954 in the Webster and Washington Schools, the building program entwined with a purpose of complete abolition of segregation necessarily involved a further accenting of this overcrowding problem; it involved a shutdown of one of the two already overcrowded schools. By September of 1955 a good faith progression of the building program had already shut down the Washington School. (R. 96a) In the Combined Webster Schools (indicating the user of the old and new buildings) there are in attendance in the 1955-1956 school year in grades 1 through 6 a total of 866 pupils, approximately 400 of whom would normally be assigned to Washington School.

The building program described above was determined upon and was going forward at the time this Court rendered its first opinion in *Brown* v. *Board of Education*, 347 U.S. 483, (May 1954). One of the Petitioners, the Vice President of the Petitioner-Board had opened up negotiations in 1953 for the disposition of the Lincoln School as soon as the building program was finished. (R. 123a) The May 1954 decision of this Court was followed by meetings of various types pertinent to the subject. In July 1954, the Lincoln School was somewhat damaged by fire and in connection therewith a former county official of Highland County was indicted and convicted of arson. On August 9, 1954, and as a result of various meetings and activities, the Petitioner-Board of Education decided to stand pat on the integration program which it had adopted and it formalized its expression in a resolution publicly adopted and promulgated to the effect "that the Hillsboro City Board of Education go on record supporting the integration program, for

children of Lincoln School, of Superintendent Upp on completion of Washington and Webster School buildings". (R. 69a)

It has been the custom in the Hillsboro School District for years to open the elementary schools for one day shortly before the County Fair; to close the schools during the County Fair and during this closed period, the pupils are assigned by the school authorities to each of the three schools; to thereupon reopen with the students attending the schools to which they have been assigned in the interim. On September 7, 1954, the three Hillsboro elementary schools, Lincoln, Washington and Webster, opened. Some seventeen Negro children reported to the Lincoln School on that day; some thirty-two reported to the Webster School; some eight reported to the Washington School. During the reassignment that year, and of the forty Negro children who had reported to Webster and Washington, twenty-eight were assigned to Lincoln, so that following the assignments, the Negro children assignments for the school year 1954-1955 were as follows:

To the Lincoln School	45
To the Washington School	8
To the Webster School	4

No white children were assigned to the Lincoln School. These assignments were made pursuant to a zoning plan adopted by the Petitioner-Board in September 1954, which the District Court found to be a "subterfuge to permit the continuance of Lincoln School for Negro children exclusively". However, there is no dispute in the record that the subterfuge was not at all permanent but was designed to keep matters as far as might be in status quo for a period pending the completion of the building program. Approximately twenty to twenty-five Negro children, including the

seven plaintiffs, refused to honor the assignment to Lincoln School and since then have refused to attend any school in Hillsboro.

On September 21, 1954, the Plaintiffs-Respondents, who are seven infant Negro children, who had reported to either Webster or Washington and who had been reassigned for the school year 1954-1955 to Lincoln, filed this action in the United States District Court for the Southern District of Ohio, Western Division. Federal jurisdiction was based on 68 Stat. 1241, 28 U.S.C.A. 1343, and on Revised Statute 1977, 42 U.S.C.A. 1981 and on Revised Statute 1979, 42 U.S.C.A. 1983, which insofar as they concern this action, provide as follows:

28 U.S.C.A. 1343 —

"The District Court shall have original jurisdiction of any civil action authorized by law to be commenced by any person * *

"3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

42 U.S.C.A. 1981 —

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and no other."

42 U.S.C.A. 1983 –

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

The complaint was stated to be a class action on behalf of a class consisting of approximately seventy eligible elementary school pupils (grades 1 through 6) and sought an injunction enjoining the Defendants-Petitioner-Board of Education, et al, from assigning the members of the class to Lincoln School and to enjoin the Petitioner from enforcing a policy of racial segregation in the public schools of Hillsboro, Ohio. A motion for a temporary injunction filed by the Respondents-Plaintiffs was heard on September 29, 1954, at the conclusion of which, the District Court decided that "this case will be continued until two weeks after" the decision of the Supreme Court of the United States on those features of the *Brown* v. *Board of Education* case reserved for further consideration in the first decision in that case. In November of 1954, the Respondents-Plaintiffs petitioned the United States Court of Appeals for the Sixth Circuit for a writ directing the District Court to proceed and hear the principal case on the merits and an order to show cause was issued by the Circuit Court of Appeals subsequent to which the District Court set this case for trial before the District Court on December 29, 1954, upon which date trial was had. In January 1955 the District Court in an opinion, a copy of which is appended hereto, found that the Petitioner-Board had adopted a program of complete

integration, that its adoption was in good faith and sincerity, that it was proceeding according to plan and that Court denied the prayer for an injunction. The District Court relied on the case of *Hecht* v. *Bowles,* 321 U.S. 321.

The case was duly appealed to the United States Court of Appeals for the Sixth Circuit, which Court announced its decision on January 5, 1946; three separate opinions were filed (copies of each of which are duly appended hereto). All three of the Circuit Judges agreed that the principles set forth in the two *Brown* v. *Board of Education of Topeka* opinions are applicable; all three agreed that the District Court erred in not keeping the cause on its docket to insure a compliance with the principles enunciated in those opinions. Two of the Circuit Judges agreed that the District Court had abused its discretion although these two Circuit Judges were in disagreement in respect of the extent of the abuse; one Circuit Judge was of the opinion that the fact situation as outlined above called for an order of immediate one hundred percent integration applicable, insofar as the Negro children involved were concerned, not only to the Plaintiffs-Respondents, but to all members of the class of seventy they represented (and this despite the fact that the record clearly indicates that the Plaintiffs-Respondents themselves, in argument (R. 133a) reduced their claim and prayer to a claim or prayer for an order affecting only the seven plaintiffs); the second Circuit Judge, while agreeing with the first that the District Court had abused its discretion, rejected the proposition that the situation called for an order for immediate and one hundred percent integration and concluded that the Petitioner-Board should be directed to immediately admit to school on a non-segregated basis all Negro school children *not now in any Hillsboro public school and providing for the end of all segregation by September 1, 1956;* the first Circuit

Judge agreed with the second in order to resolve the matter in a majority opinion; *the third Circuit Judge dissented and concluded that there was no improvident exercise of judicial power by the court below.*

There is no dispute with that portion of the judgment of the Court of Appeals which directs the District Court to hold the case on its docket. There is no dispute with that portion of the judgment of the Court of Appeals which decrees an end of all segregation in the Hillsboro School District by September 1, 1956. That is exactly what the Board has been trying to do since a substantial time before this case started and it is exactly what it has been trying to do ever since it started and as stated in the Petitioner's application for rehearing to the Court of Appeals, "Appellees (the Board, et al) are prepared to meet and have an independent intention of meeting" this requirement.

There are at the present time approximately twenty Negro children of elementary school age (including the seven plaintiffs) who are not now attending any school in Hillsboro, who are affected by the majority judgment of the Court of Appeals. The Petitioners assert that they had discharged their primary responsibility for elucidating, assessing and solving the problems involved with the integration of those twenty children; that complete integration in September 1956 was according to a plan which dealt with many problems, one of which was integration, and that that plan constituted good faith implementation of the abolishment of segregation; that local conditions extended some discretion and the discretion of the Petitioner-Board, et al, in respect of the twenty children was providently exercised; that the appraisal of the District Court was performed judicially and did not involve any abuse of judicial discretion.

(H)

ARGUMENT

—1—

The Court of Appeals Decided A Federal Question In A Manner In Conflict With Applicable Decisions Of This Court.

One of the questions which this Court propounded for further argument after the first decision in the *Brown* case was this —

> "4. Assuming it is decided that segregation in public school violates the Fourteenth Amendment —
>
> "a) Would a decree necessarily follow providing that, within the limits set by normal geographical school districting, Negro children should forthwith be admitted to schools of this choice, or
>
> b) May this court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought from existing segregated systems to a system not based on color distinctions."

This Court therefore directly stated as a question for its determination and as applicable to an "existing segregated system" whether or not the granting of an injunction, in a situation in which the denial of it would necessarily continue the deprivation of a basic human right, i.e., the right to an integrated education, was within the discretion of the chancellor. This Court answered the propounded question in its second opinion in the *Brown* v. *Board of Education of Topeka* case, 349 U.S. 294, in the affirmative and set forth the conditions under which a federal court of equity might properly take into account the public interest in the elimination of obstacles in a systematic and effective manner

and therefore, within judicial discretion, withhold the issuance of an immediately effective injunction. The majority opinion is based (Opinion of the Court of Appeals) on the conclusion—directly opposite to the conclusion of this Court—that there is no judicial discretion in a chancellor to withold the issuance of an immediately effective injunction if the effect of the witholding would be to continue the deprivation of any basic human right. The Circuit Court of Appeals said in its opinion, "While the granting of an injunction is within the judicial discretion of the District Judge, extensive research has revealed no case in which it is declared that a judge has judicial discretion by denial of an injunction to continue the deprivation of basic human rights."

—2—

The Judgment Below Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

The District Court was called upon, for reasons dealt with hereinabove, to decide this case some five months in advance of the announcement of the second opinion of this Court in *Brown* v. *Board of Education;* however, excepting in dismissing the complaint rather than keeping the action pending on the docket, the District Court correctly conceived his duty as subsequently set forth by this Court in the *Brown* opinion and as evidenced by the opinion of the District Court appended hereto. The District Court decided that even though personal rights were involved, it had authority under the opinion in *Hecht* v. *Bowles* to withhold an injunction if the Petitioners-Defendants were acting in good faith to implement the governing constitu-

tional principle set forth in the first *Brown* v. *Topeka* opinion. The District Court proceeded to consider whether the Petitioners-Defendants had a plan, whether it was adopted in good faith, whether it was being carried forward with deliberate speed and whether the delay in complete integration was consistent with good faith and necessary in the public interest. The trial court approached these problems as the "judicial appraiser" or fact finder and arrived at these conclusions of fact (opinion appended):

> First — That in 1953 the Board of Education of Hillsboro had taken steps looking toward the disposal of the Lincoln School; that these preliminary steps had been taken long before this lawsuit was filed.
>
> Second — That the Petitioners-Defendants years ago recognized that the policy of segregation in Lincoln School was a violation of Ohio law and adopted a program designed to completely integrate the elementary school pupils.
>
> Third — That this program called for the building of two modern schools and the discontinuance of Lincoln School.
>
> Fourth — The Hillsboro High School has been integrated for some years.
>
> Fifth — The seventh and eighth grades of the elementary schools were completely integrated in 1951.
>
> Sixth — In September 1954 approximately a fifth of the Negro children eligible for the first through sixth grades were assigned by the Hillsboro Board of Education to schools theretofore attended only by white pupils.
>
> Seventh — There was insufficient space in the Washington and Webster Schools in September 1954 to accommodate any more pupils than were assigned there.
>
> Eighth — In order to put its program of complete integration into effect it was necessary to raise money by bond issues.

Ninth — The voters failed to pass the bond issues on three occasions, but finally passed one in 1953.

Tenth — The Board fully expects the new buildings to be completed within two years and are officially on record as favoring complete integration and the discontinuance of Lincoln School.

Eleventh — The good faith and sincerity of the Board of Education and its Superintendent of Schools (Petitioners) in their endeavor to overcome what they concede as segregation is amply supported by the record.

Twelfth — That if an injunction were granted on behalf of the entire class involved, i. e., the seventy Negro children, it would seriously disrupt the orderly procedure and administration of the Washington and Webster Schools to the detriment of all the students in the class rooms affected by the order.

Thirteenth — That it was not the Court's duty to interfere with the program of integration adopted by the Petitioners.

Fourteenth — That the integration program of the Petitioners was adopted and proceeding in a dignified and intelligent manner; flowed from a desire, among other things, to avoid any racial problems; that the spirit of the Hillsboro community was such that it would be unwise to completely and immediately integrate and would contribute to difficulties.

The trial court therefore found that the Petitioner-Board had made a prompt and reasonable start toward full integration; that a plan had been adopted which was adequate to accomplish this and in a reasonable time in the light of the local problems; that the additional time was necessary in the public interest and was consistent with good faith compliance at the earliest practicable date.

These findings were amply supported by the record, were made by the court characterized by this Court in the second *Brown* opinion as able to "best perform this judicial appraisal" and are entitled in all respects to the sanction

of Federal Rules of Civil Procedure and particularly Rule 52A providing that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The record amply sustains the findings of the trial court that the public interest required elimination of obstacles in a systematic and effective manner and some relatively slight delay in complete integration: First, the concurring Circuit Judge conceded this in refusing to concur in any judgment which would require complete integration immediately, even in January 1956. Whereas the plaintiffs had sought a complete integration of seventy children in September of 1954, the majority opinion of the Circuit Court in January of 1956 would require an integration affecting only some twenty or twenty-five Negro children – this in and of itself recognizes that even currently there are some practical obstacles which would result in the appellation "good faith" being tacked on the segregation of half the Negro children involved.

Second, the record clearly indicates that this particular Board of Education is no stranger in accomplishing integration in a dignified and successful and unmarred manner. Some years ago it accomplished, in an area in which segregation has been practiced as long as it has been anywhere, integration in a high school system. Only five years ago it accomplished integration in the seventh and eighth grades. No incident marked either. In 1953 it set out on a plan to adopt integration in the entire elementary school and with that announced intention, not only sought from the voters in the community the necessary funds but, after three defeats, kept it up and was successful. It was well on the way of completely accomplishing its own program without any incident when an effort to hurry it up by out-

siders caused an incident on July 4, 1954 — the only incident to date. This Board is an expert, left to itself, in arriving at one hundred percent integration without incident and the opinion of such a Board that the spirit of the community is completely handleable by September 1956 is worth something to one who has never had the problem but merely had the problem of judicially appraising its good faith. That is particularly true in the light of the fact that in September 1954, Petitioner-Board made an approximate 25% step along the 100% road in the first six elementary grades.

Third, it was the stipulation of the parties that with all three schools going in 1953-1954, the Washington and Webster Schools were overcrowded. The building program resulted in there being only one of the two so-called white schools in operation by September 1955, thereby accenting the overcrowding problem. The continuance of the temporary segregation practice was related directly to an interim situation caused by carrying out a building program and the temporary loss of one adminstrative facility. It is a matter of common knowledge that the closing of an already crowded administrative facility, followed by the jamming of pupils in one remaining facility pending the completion of a brand new one creates a number of administrative problems to any school board — and the desire to not add further administrative problems to an already unusual situation is certainly a desire that can be aptly described by a District Court as one adopted in "good faith".

Fourth, the uncontradicted testimony in the record, through the Board's solicitor, and in respect of which he was not cross-examined, was to the effect that the problem could not be feasibly tackled by sending white children to Lincoln School. He stated, "The spirit of the community and history of what had happened in other communities

close to Hillsboro in similar situations indicated it would be disastrous to attempt to assign white children to what was considered in the minds of the community a colored school."

Fifth, added to the whole problem was another — in or about 1954 it became necessary for the Petitioner-Board to seek an extra levy of school taxes in an election for the purpose of operating efficiently the whole school system. This was an extra levy for operating purposes on top of the bond issue which was related to building purposes. The testimony of the Board-Petitioner's Superintendent was uncontradicted in respect of the levy as follows: "Now if I may add this as a problem of mine: at about the time we were having the integration or assignment problem, we were submitting to our voters an operating levy for additional money for the operation of our schools. I did not want to do anything in our community for the adults, not for the children, that would cause any friction whatsoever. Now whether my judgment was right, or whether it was wrong I don't know, but that was my judgment."

This Court has repeatedly held that the discretion of the chancellor is necessarily broad and a strong showing of abuse must be made to reverse it. *United States* v. *W. T. Grant Co.* 345 U.S. 629. This Court has also recently and forcefully held that Federal Rules of Civil Procedure 52A in respect of findings of fact by the trial court should be particularly adhered to in cases in which the issue is one of good faith or of credibility of witnesses, motives or purposes. In *United States* v. *Oregon Medical Association*, 343 U.S. 326, there was quoted with approval this statement from a New York Court of Appeals decision:

> "Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. How

> can we say the judge is wrong. To the sophistication and sagacity of the trial judge, the law confides the duty of appraisal."

The discharged duty of appraisal should be interfered with only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *Gypsum Co.*, 333 U.S. 364.

That this Court has, and in the past has exercised, the power of supervision in such instances, is clear from *McAllister* v. *United States*, 348 U.S. 19.

In its present status this Hillsboro case stands as authority for this proposition — a school board, administering an area in which segregation has been practiced for many years, acts in bad faith if it sets out to solve the problem via a new school building program which will accomplish complete integration by September 1, 1956; a board must do it now; and any trial court which characterizes such an approach as a good faith one is taking an action which leaves a reviewer "with the definite and firm conviction that a mistake has been committed". (*United States* v. *Gypsum Co.*, supra.)

It is respectfully submitted that such a conclusion is so far out of line with the directives given by this Court in the second *Brown* decision as to require supervisory action by this Court.

(I)

APPENDICES

Appended are (1) a copy of the opinion of the District Court in this case filed January 28, 1955; (2) copy of the three opinions (majority, concurring and dissenting) of the Sixth Circuit Court of Appeals filed January 5, 1956; (3)

a copy of the Judgment of the Court of Appeals; (4) a copy of the Order of the Court of Appeals, Denying Rehearing.

CONCLUSION

It is accordingly prayed that this Petition be granted.

Respectfully submitted,

TIMOTHY S. HOGAN,
Attorney for Petitioners.*

JAMES D. HAPNER,
Counsel for Petitioners.
Cincinnati, Ohio
February 20, 1956

APPENDIX

In The
UNITED STATES DISTRICT COURT
For the Southern District of Ohio
Western Division

Civil No. 3440

JOYCE MARIE CLEMONS, an infant, by GERTRUDE CLEMONS, her mother and next friend; DEBORAH K. ROLLINS, an infant, by NORMA ROLLINS, her mother and next friend; MYRA DARLINE CUMBERLAND, an infant, by ZELLA MAE CUMBERLAND, her mother and next friend; EVELYN MARIE STEWARD, VIRGINIA ANN STEWARD, and CAROLYN LOUISE STEWARD, infants, by ELSIE STEWARD, their mother and next friend; DOROTHY MARIE CLEMONS, an infant, by ROXIE CLEMONS, her mother and next friend, on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

THE BOARD OF EDUCATION OF HILLSBORO, OHIO, a body corporate, PAUL L. UPP, Superintendent, Board of Education, Hillsboro, Ohio; MARVEL K. WILKIN, President; ELMER HEDGES, Vice President; WILFRED L. FAUL, WILLIAM L. LUKENS and JOHN HENRY BROWN, members of the Board of Education of Hillsboro, Ohio; PAUL L. UPP, Superintendent of Schools of Hillsboro,

Defendants.

OPINION

(January 28, 1955)

DRUFFEL, District J.

Plaintiffs in their complaint invoke the jurisdiction of this court pursuant to Title 28, United States Code, Section 1343 (3), to redress a claimed deprivation under color of any State law, statute, ordinance or regulation of any rights

secured by the Constitution of the United States, i.e., the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

This is a proceeding for a permanent injunction enjoining defendants, and each of them, or their agents, from enforcing a claimed policy of racial segregation in the public elementary schools of Hillsboro, Ohio, and being a class action brought by plaintiffs on behalf of themselves and others similarly situated, pursuant to Rule 23 (a) (3) of the Federal Rules of Civil Procedure.

The members of plaintiffs' class are infant Negro children, who, it is claimed, after being duly enrolled in the Washington and Webster elementary schools, were forced to withdraw solely because they were Negroes and were assigned to the Lincoln elementary school, which it is claimed, was maintained and operated by the Board of Education as a school to be attended exclusively by Negro elementary school children; that Lincoln school, in its physical facilities and curriculum, was grossly inferior to Washington and Webster schools; that this class action involves approximately seventy Negro infants, and a common relief is sought for each of these plaintiffs as well as for the class.

Defendants answered, admitting all formal allegations of the complaint, and allege that the attendance in the elementary schools by children living within the corporate limits of Hillsboro, is determined by the place of residence of the pupils concerned, and not by race, color, or national origin.

Plaintiffs evidence furnished through the President of the Board of Education, the Superintendent of the Schools, and expert witness in the person of a professor of educational administration, and a colored teacher of Lincoln School, together with an agreed stipulation of facts, subject, however, to the qualifying testimony concerning the School

Board's program to completely integrate the elementary schools, virtually established the allegations of their complaint, including plaintiff's claim that the establishment of the so-called elementary school zone is a subterfuge to permit the continuance of Lincoln School for Negro children exclusively.

The only direct evidence offered by the defendants was by one of the members of the Board of Education, who testified that approximately a year ago he was authorized by the Board to negotiate the disposal of Lincoln School. This evidence was received over plaintiffs' objections to show the good intentions of the defendants in attempting to dispose of the Lincoln School building before this suit was filed.

Without discussing the evidence in too minute detail, it fairly appears, and this court finds as a matter of fact, that the defendants, years ago, recognized that the policy of segregation of Negro children in Lincoln School was a violation of the Ohio law, and adopted a program designed to completely integrate the elementary school pupils. This program called for the building of two modern schools and the discontinuance of Lincoln School.

The Hillsboro High School has been integrated for some years; the seventh and eighth grades of the elementary schools were completely integrated in 1951, and in September, 1954, fifteen Negro children were assigned to Washington and Webster Schools, three of them transferring to Lincoln School later at their own request; the seven infant plaintiffs being transferred to Lincoln School according to Mr. Upp, Superintendent of Schools, because there was insufficient space to accommodate them in Washington and Webster.

In order to put its program of complete integration into effect, it was necessary to raise the money by bond issues.

The voters failed to pass the bond issues on three occasions, but finally passed one in 1953. The Board of Education fully expects the new building to be completed within two years and are officially on record as favoring complete integration and the discontinuance of Lincoln School, the bone of contention here.

The good faith and sincerity of the Board of Education, and its Superintendent of Schools, Paul Upp, in their endeavor to overcome what they concede as temporary segregation, is amply supported by the record.

Although in their complaint plaintiffs allege this is a class action involving some seventy Negro children, in their argument at the close of the case, they asked only that the seven infant plaintiffs be restored to their former seats to which they were assigned in Webster and Washington schools, well knowing that the remaining approximate sixty Negro children would be entitled to the same privilege. They argue that sufficient space could be found for the seven infant plaintiffs.

However, if an injunction were granted in this case, the same move would be made for the remaining sixty. In the opinion of the court, this would seriously disrupt the orderly procedure and administration of the Washington and Webster schools to the detriment of all the students in the classrooms affected by the order.

Under the circumstances as disclosed by the evidence we do not deem it our duty to interfere with the program of integration as outlined by the Board and Mr. Upp, Superintendent of Schools. We think Mr. Upp's solution is sound and the best:

> "I have lived, as you know, in Hillsboro for a long time, and I am trying to do and guide the integration problem in a very dignified and intelligent manner. I want no racial problems to develop.

"And I stated previous, and I state now, that I think I know the spirit of our community well enough to know that it would not be wise to do that at this time, and that it would contribute to difficulties. I really think so."

(Record, page 49)

The Ohio courts have long recognized that Boards of Education "in the exercise of their powers * * * have a wide discretion, and that the courts will not interfere with that exercise of sound discretion in the absence of an abuse thereof." *Board of Education of Cleveland Heights et al.* v. *State ex rel. Goldman*, 191 N.E. 914, 916.

In an action in which the Price Administrator sought an injunction to prevent acts and practices violative of the Emergency Price Control Act of 1942, which the District judge refused, the Supreme Court, on appeal, said among other things:

"We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' (Meredith v. Winter Haven, 320 U.S. 228, 235.) The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each degree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied." Hecht Co. v. Bowles, 321 U.S. 321, 329, 330.

We believe the explicit language of the Supreme Court in that case must control the decision here, and for that reason this court feels obliged to deny plaintiffs' prayer for an injunction, and it is so ordered, at plaintiffs' costs.

An entry may be prepared to carry this decree into effect, with exceptions.

JOHN H. DRUFFEL
United States District Judge

APPEARANCES:

For Plaintiffs
Russell L. Carter, Dayton, Ohio.
James H. McGee, Dayton, Ohio.
Thurgood Marshall, New York, N.Y.
Constance Baker Motley, New York, N.Y.

For Defendants
James D. Hapner.

In The
UNITED STATES COURT OF APPEALS
For the Sixth Circuit

No. 12494

JOYCE MARIE CLEMONS, an infant by Gertrude Clemons, her mother and next friend, et al.,
Appellants,

v.

THE BOARD OF EDUCATION OF HILLSBORO, OHIO, a body corporate, et al.,
Appellees.

Appeal from the District Court of the United States for the Southern District of Ohio, Western Division.

Decided January 5, 1956.

Before ALLEN, MILLER and STEWART, Circuit Judges.

ALLEN, Circuit Judge. This is an equity case filed in the United States District Court on behalf of plaintiffs and others similarly situated, praying for preliminary and permanent injunction enjoining defendants, the Board of Education of Hillsboro, Ohio, hereinafter called "the Board," the individual members of the Board, and the Superintendent of Schools of the city, from enforcing a policy of racial segregation in the public schools of Hillsboro, Ohio, from requiring plaintiffs to withdraw from the

Webster and Washington Schools because of their race and color, and from requiring plaintiffs to attend Lincoln Elementary School or any other school in the city of Hillsboro which is exclusively attended by Negro children.[1] The District Court denied the injunction.

There is no controversy as to the material facts of the case. There are three elementary schools in Hillsboro, Ohio, Washington, Webster, and Lincoln. Washington and Webster Schools have 12 regular elementary classrooms each, with one teacher assigned to each room and teaching one grade in the room. For approximately 15 years prior to September 7, 1954, the Webster and Washington Schools have been attended exclusively by white children.

Lincoln School has four classrooms, two of which are in use as regular classrooms. It has long been maintained exclusively for Negro children and it has two full-time Negro teachers who teach six elementary grades in two rooms. On September 8, 1954, Lincoln School had an enrollment of 17 Negro children.

Segregation of school children according to race or color is not permitted under Ohio law. A statute providing for such segregation, Section 4008, Revised Statutes of Ohio (1886), was repealed in 1887, 84 Ohio L. 34. The Supreme Court of Ohio construed these enactments in 1888 and unanimously held that, while under Ohio Revised Statute (Section 4013) "power is conferred on boards of education to make such assignments of the youth of their respective districts, to the schools established by them, as will, in their opinion, best promote the interest of education in their districts, such power cannot be exercised with reference to the race or color of the youth; and section 4008 having been repealed by the act of the general assembly passed February 22, 1887 (84 Ohio L. 34), separate schools for

[1] The parties will be denominated as in the court below.

colored children have been abolished, and no regulation can be made under section 4013, that does not apply to all children irrespective of race or color." *Board of Education* v. *The State,* 45 O. S. 555. In *Board of Education of School District of City of Dayton* v. *The State,* 114, O. S. 188, a suit was filed in the Court of Appeals of Montgomery County, Ohio, praying a writ of mandamus to compel the Board of Education and the Superintendent of Schools of the City of Dayton to admit relator's children and other children of the colored race to the schools of the city on equal terms with white children. A demurrer was filed to this petition and overruled in the Court of Appeals. The Supreme Court unanimously affirmed the judgment in favor of the relator and against the Board of Education upon the authority of the *Board of Education* v. *The State,* 45 O. S. 555.

The Hillsboro schools in part have complied with the Ohio law. The High School in Hillsboro is attended by both Negro and white children. The segregation of pupils in the 7th and 8th grades was discontinued by the Board in 1951. But the long standing segregation in Lincoln School still exists. On September 7, 1954, plaintiffs, colored children of elementary school age, were registered, three in Webster and four in Washington School, and each assigned a seat in a classroom. Immediately thereafter the schools were closed for several days, and on September 14th plaintiffs were reassigned to Lincoln School.

On September 13th the Board established school zones for the City of Hillsboro. This was the first school zoning ever set up for Hillsboro schools. The resolution of the Board divided the city into three school zones, Washington, Webster and Lincoln. The Lincoln zone was divided into two completely separated parts, one in the northeast and one in the southeast section of the city. Three of the

plaintiffs who live in the southeast part of the Lincoln zone have to pass by the Washington School in order to reach the Lincoln School. The Lincoln School is not in the Lincoln zone, but in the Washington zone. There has been some crowding in the schools of Hillsboro, the average number of pupils per room on September 8, 1954, being 35.4 in the Washington School and 38 in the Webster School. There was a drop in the enrollment of Hillsboro of some 29 pupils in the last school year.

In view of the overcrowding of the schools proposals to extend the Washington and Webster buildings were developed by the Board. A bond issue was proposed and approved by the voters in 1953, and the plans for building are now being carried out. The Webster School is to be rebuilt in its entirety and the Washington School is to have an addition. On August 9, 1954, the Board adopted a resolution which reads as follows:

> "That the Hillsboro City Board of Education go on record supporting the integration program, for children of Lincoln School, of Supt. Upp on completion of Washington and Webster School Buildings."

The uncontradicted testimony shows that the school officials intended, upon completion of Washington and Webster School buildings, to abandon the use of Lincoln School. The date when the two buildings will be completed is variously estimated as being around the middle of 1956 or around 1957. Defendants claimed in their answer that under the zoning plan the attendance in the elementary schools by children living within Hillsboro is determined by the place of residence of the pupils concerned and not by race, color, or national origin. However, the Superintendent of Schools testified that a "temporary segregation" existed due primarily to the building situation. This "temporary segregation" of course was a continuation of

a segregation existing over a number of years at the Lincoln School.

The District Court made the following finding:

> "Plaintiffs' evidence furnished through the President of the Board of Education, the Superintendent of the Schools, an expert witness in the person of a professor of educational administration, and a colored teacher of Lincoln School, together with an agreed stipulation of facts, subject, however, to the qualifying testimony concerning the School Board's program to completely integrate the elementary schools, virtually established the allegations of their complaint, including plaintiffs' claim that the establishment of the so-called elementary school zone is a subterfuge to permit the continuance of Lincoln School for Negro children exclusively."

The District Court denied the relief prayed for upon the ground that it would seriously disrupt the orderly procedure and administration of Washington and Webster Schools if an injunction were granted in the case. It held that under Ohio law, as well as under *The Hecht Company* v. *Bowles*, 321 U. S. 321, the exercise of discretionary powers of the Board should not be interfered with. This conclusion is clearly erroneous and constitutes an abuse of discretion on the part of the District Court.

The District Court did not have the benefit of the decision in *Brown* v. *Board of Education of Topeka*, 349 U. S. 294. However, before this case was decided below the Supreme Court had declared in *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, that segregation in the public high schools and elementary schools of the United States is a violation of the 14th Amendment. In the subsequent decision, *Brown* v. *Board of Education of Topeka*, 349 U. S. 294, the Supreme Court said that courts will have to con-

sider whether the action of school authorities constitutes "good faith implementation of the governing constitutional principles." The court declared, "At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis" and stated that the burden rests upon the defendants when they seek additional time in which to desegregate the school system to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. Cf. *Lucy and Myers* v. *Adams, Dean of Admissions, University of Alabama*, 294, Misc., Supreme Court of the United States, announced October 10, 1955.

The District Court held that the establishment for the first time in Hillsboro of a zoning system with a gerry-embrace practically the entire colored population of the city, was brought about as a subterfuge to segregate children who had been admitted to Webster and Washington Schools. This was in violation of the law of the State of Ohio, *Board of Education* v. *The State*, 45 O. S. 555; *Board of Education of School District of City of Dayton* v. *The State*, 114 O. S. 188. It was in violation of the decision of the Supreme Court of the United States and of the Constitution of the United States.

This is an equity case in which a permanent injunction is sought to protect basic civil rights. The principles governing the issuance of such an injunction are stated by Pomeroy: Equity Jurisprudence, Vol. 4, 5th Ed., 934, 935, as follows:

> "Whatever be its form, decree or order, the remedy by ordinary injunction is wholly preventive, prohibitory, or protective. . . .
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> "In determining whether an injunction will be issued to protect any right of property, to enforce any

obligation, or to prevent any wrong, there is one fundamental principle of the utmost importance, which furnishes the answer to any questions, the solution to any difficulties which may arise. This principle is both affirmative and negative, and the affirmative aspect of it should never be lost sight of, any more than the negative side. The general principle may be stated as follows: Wherever a right exists or is created, by contract, by the ownership of property or otherwise, cognizable by law, *a violation of that right will be prohibited*, unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy. *The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognized by the law, and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limit its exercise.* This jurisdiction of equity to prevent the commission of wrong is, however, modified and restricted by considerations of expediency, and of convenience which confine its application to those cases in which the legal remedy is not full and adequate. Equity will not interfere to restrain the breach of a contract, or the commission of a tort, or the violation of any right, when the legal remedy of compensatory damages would be complete and adequate. The incompleteness and inadequacy of the legal remedy is the criterion which, under the settled doctrine, determines the right to the equitable remedy of injunction."

The same test was established by the Supreme Court in *Sterling* v. *Constantin*, 287 U. S. 378, 403. The Supreme Court said:

"Whether or not the injured party is entitled to an injunction will depend upon equitable principles; upon the nature of the right invaded, and the adequacy of the remedy at law."

The rights here sought to be protected have existed under Ohio law since 1888 and they were declared by the Supreme Court to exist under the United States Constitution in an opinion announced several months before the District Court denied the injunction sought. *Brown* v. *Board of Education of Topeka*, 347 U. S. 483. If injunction will issue to protect property rights and "to prevent any wrong," Pomeroy, *supra*, it will issue to protect and preserve basic civil rights such as those for which the plaintiffs seek protection. While the granting of an injunction is within the judicial discretion of the District Judge, extensive research has revealed no case in which it is declared that a judge has judicial discretion by denial of an injunction to continue the deprivation of basic human rights.

The District Court in the instant case found that such rights had been invaded when it found that the zoning resolution was adopted as a subterfuge in order to continue segregation. The children were assigned seats in non-segregated schools at a time when the school population was numerically larger than at present.

The excuse of crowding to justify segregation has no basis in law nor, in this case, in fact. The court's denial of the permanent injunction prayed for was entered February 16, 1955. It is contemplated that the building program which will provide additional classrooms will not be completed until the middle of 1956, or perhaps until 1957. The judgment below continued for an indefinite period the violation of law carried out by the Board of Education. In view of the admitted violation of plaintiff's statutory and constitutional rights the equities here are on the side of plaintiffs. Equitable relief by injunction is essential in order to protect these colored children. There is no adequate remedy at law.

It follows that the judgment of the District Court is contrary to the rules of equity and constitutes an improvident exercise of judicial power. It is generally held that the trial court abuses its discretion when it fails or refuses properly to apply the law to conceded or undisputed facts. *Union Tool Co.* v. *Wilson,* 259 U. S. 107, 112. Misapplication of the law to the facts is in itself an abuse of discretion. *Hanover Star Milling Company* v. *Allen & Wheeler Company,* 208 Fed. 513, 523 (C. A. 7). Such abuse of discretion requires reversal. *Bowles* v. *Simon,* 145 Fed. (2d) 334 (C. A. 7). Here the allegations of the complaint were sufficient, the evidence was undisputed, and it was undisputed that defendants ignored the statutory and constitutional rights of these plaintiffs.

It was stated in *The Hecht Co.* v. *Bowles, supra,* that the discretion exercised by the courts in granting an injunction under the Emergency Price Control Act "must be exercised in light of the large objectives of the Act." We think the large objectives of the non-segregation program support plaintiff's contentions. The crowding problem relied on by defendants is small and in no way comparable in difficulty or complexity to the shift of entire school systems necessitated in certain states described in the education cases *Brown* v. *Board of Education of Topeka,* 347 U. S. 483, and 349 U. S. 294.

There are seven plaintiffs and on September 8, 1954, seventeen additional colored children were enrolled in Lincoln School. The total number of segregated colored children approximates the figure by which the school population of Hillsboro is smaller this year than last year. If the Board will recognize the law it will have no greater problem in placing these colored children than in placing an equal number of white children. Since Lincoln has been for many years a segregated school, it is a fair assumption

that the Board would not send new pupils, white children, to the Lincoln School. It did not do so, although there were two vacant schoolrooms at Lincoln which could have been used to decrease the general crowding. The Board doubtless would send new pupils, white children, to Webster and Washington Schools. The Negro children should be given the same treatment.

In its latest decision the Supreme Court has enjoined upon the school authorities that they act "with all deliberate speed." *Brown* v. *Board of Education of Topeka,* 349 U. S. 294, 301. Certainly in *Lucy and Myers* v. *Adams, supra,* the Supreme Court indicated its determination to have these matters taken care of promptly.

The majority of the court concludes that the Board abused its discretion and violated state and constitutional law in establishing the zoning ordinance and assigning these plaintiffs to segregated schools, and that the District Court abused its discretion in refusing to enjoin this continued violation of law.

The writer of this opinion thinks that this case should be remanded to the District Court with instructions to restate its conclusions of law in accordance with the majority opinion and to issue a permanent injunction as prayed for in the complaint and to enjoin the defendants from establishing school zones in the city of Hillsboro in such a way as to effect segregation of school children upon a basis of race or color. As this is a class action the relief described above, should in my opinion be accorded, not only to the plaintiffs named, but to other colored children similarly situated. Since neither of my brothers concurs in such an order I am compelled to concur in an order along the line suggested by my concurring colleague, Judge Stewart.

STEWART, Circuit Judge, concurring. At the time this case was decided, the Supreme Court's second opinion in the segregation cases had not been announced. *Brown* v. *Board of Education of Topeka*, 349 U. S. 294 (1955). The district court was therefore without the guidance of that decision.[2] In the retrospective light of that opinion, all three members of this court are agreed that the district court was in error in not retaining jurisdiction of this controversy, and that the case should now be remanded to that court with directions to retain jurisdiction.

The single question which appears to divide us is what guidance, if any, we should now give the district court as to the future exercise of its jurisdiction. That question, I think unfortunately, must apparently be cast in terms of whether or not there has been an "abuse of discretion." Certainly there has been none in any popular concept of that phrase. The district judge obviously gave thorough consideration to the issues involved. The decision he reached was motivated by his confidence that the human problem here was being worked out in an orderly way by the voluntary action of the people of the Hillsboro community. In other contexts the court's decision would have been a commendable exercise of judicial self-restraint, consistent with historic principles of equity. *Hecht Co.* v. *Bowles*, 321 U. S. 321 (1944).

"The term abuse, however, when applied to a court's exercise of its discretion is peculiarly of legal significance, wholly unrelated to the same term when used in common parlance. . . . Abuse of discretion in law means that the

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[2] Following a hearing on appellants' motion for a preliminary injunction, the district court originally continued further proceedings until two weeks after the Supreme Court should issue its decision on the manner in which relief was to be accorded in the segregation cases. The district court proceeded to a final adjudication of this case prior to that time only after this court had issued a show cause order in response to the appellants' petition for a writ of mandamus.

court's action was in error as a matter of law." *Beck* v. *Wings Field, Inc.*, 122 F. (2d) 114, 116 (3 Cir., 1941).

In the present case I think the area permissible under the law for the exercise of judicial discretion was an extremely narrow one, and that its allowable limits were exceeded by the district court in denying injunctive relief.

In the cases recently decided by the Supreme Court racial segregation on the part of the school authorities was required or permitted by the states involved. The Court recognized in its second opinion in those cases that the transition to an integrated school system in such states would involve many difficult practical problems, varying in each locality, but in each locality requiring the uprooting of a system of education built upon decades of state custom and state law. Yet the Court directed that that transition take place with "all deliberate speed." (p. 301)

By contrast the segregation of school children because of their race has been contrary to the law of Ohio for almost seventy years. The Hillsboro Board of Education created the gerrymandered school districts after the Supreme Court had announced its first opinion in the segregation cases. The Board's action was, therefore, not only entirely unsupported by any color of state law, but in knowing violation of the Constitution of the United States. The Board's subjective purpose was no doubt, and understandably, to reflect the "spirit of the community" and avoid "racial problems," as testified by the Superintendent of Schools. But the law of Ohio and the Constitution of the United States simply left no room for the Board's action, whatever motives the Board may have had. I think the appellants were clearly entitled to injunctive relief as a matter of right in this case.

I therefore concur with Judge Allen in remanding this case to the district court with directions to enjoin the defendants from continuing racial segregation of children

in the Hillsboro schools. But I would give a wider scope to the district court within which to frame the terms of its decree.

Our decision in this case will be announced in the midst of a school year. No reason appears why those Negro children of school age who are not now attending any school should not be admitted immediately to whichever of the three schools a system of attendance zones based upon geographic or other relevant non-racial considerations may dictate. To undertake before the end of the present school year a wholesale shifting of the other Negro and white children now in school might, however, serve to cause dislocation and hardship out of proportion to the purpose to be served. So, at least, I think the district court might properly find.

I therefore believe that this case should be remanded to the district court with instructions to retain jurisdiction, and after prompt notice to the parties and opportunity for hearing, to frame a decree which will provide for the immediate admittance to school on a nonsegrated basis of school age Negro children not now in any Hillsboro public school, and which will further provide for the end of all racial segregation in the Hillsboro public schools on or before the commencement of the school year in September, 1956.

It was estimated at the time of the hearing in the district court that the new school buildings in Hillsboro would be completed about January, 1957, although the record is not entirely clear on this point. If that is true, there may be some overcrowding of classrooms for the first half of the next school year, in the event the Board decides to make no use of the present Lincoln School building. Overcrowded classrooms, however, are unfortunately not peculiar to Hillsboro, and the avoidance alone of somewhat overcrowded classrooms cannot justify segregation of school children solely because of the color of their skins.

MILLER, Circuit Judge, dissenting. The granting or denial of the injunction prayed for was a matter within the judicial discretion of the District Judge. *Brown* v. *Board of Education of Topeka*, 349 U. S. 294, 300-301.

In such cases it is well settled that upon appeal the ruling will not be disturbed unless contrary to some rule of equity or the result of improvident exercise of judicial discretion. *Meccano, Ltd.* v. *John Wanamaker*, 253 U. S. 136, 141; *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 338. The discretion of the chancellor is necessarily broad and a strong showing of abuse must be made to reverse it. *United States* v. *W. T. Grant Co.*, 343 U. S. 627, 633. Discretion, in this sense, is abused when the judicial action is arbitrary, not justifiable in view of the situation and circumstances. *Hartford-Empire Co.* v. *Obear-Nester Glass Co.*, 95 F. (2d) 414, 417, C. A. 8th; *Delno* v. *Market St. Ry. Co.*, 124 F. (2d) 965, 967, C. A. 9th. If reasonable men could differ as to the propriety of the action taken by the District Judge, it can not be said that the District Judge abused his discretion. *Delno* v. *Market St. Ry. Co.*, supra; *McHenry* v. *Foutty*, 223 Ind. 335, 60 N. E. (2d) 781, 158 A. L. R. 537.

Irrespective of whether we agree or disagree with the ruling of the District Judge, I do not believe his ruling can be considered arbitrary or one concerning which reasonable men might not differ. Problems related to administration, which the Supreme Courts specifically pointed to in *Brown* v. *Board of Education of Topeka*, supra (at pp. 300-301) as problems which the Court might consider in reaching its decision, are present in this case, such as those arising from the physical condition of the school plant and the school transportation system. The District Judge was also authorized by the same opinion to consider the adequacy of any plans which the Board might have to meet these problems and to effectuate a transition to a racially non-

discriminatory school system. The Board has adopted a plan which will effectuate the transition as soon as construction work now in progress is completed. The plan has been approved by the residents of the community who have voted the necessary bonds to finance it.

It should also be noted that this case does not have a background of opposition on the part of the Board to integration of the public school system in Hillsboro. The Hillsboro High School has been integrated for some years. Segregation of pupils in grades 7-8 was discontinued in 1951. At that time the Board discussed the question of integration of the complete school system in contemplation of the passage of bond issues. Three proposed bond issues failed to pass, but in 1953 the necessary bond issue was approved. On August 9th, 1954, before this action was filed, the Board unanimously passed a resolution approving a plan calling for integration of all school children in Hillsboro effective upon the completion of the new elementary buildings. The plan included the rehabilitation of the Washington building with the interior torn down and rebuilt, the work to start in June 1955. The Board decided that integration should be delayed until this work was completed.

The Supreme Court stated in its opinion in *Brown* v. *Board of Education of Topeka*, supra, that the District Courts should require that local school authorities "make a prompt and reasonable start toward full compliance with our May 17, 1954 ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an *effective manner*." (Emphasis added.) The additional directive that there must be a "good faith compliance at the earliest practical date" does not require an immediate transition, regardless of the practical problems involved. The language itself recognizes the probable

existence of practical problems, the solution of which, as pointed out by the Court, is the primary responsibility of the school authorities.

I am of the opinion that there was no abuse of discretion on the part of the District Judge in refusing to grant the injunction prayed for. I believe that the action should be retained on the docket of the District Court for further consideration by the Court if and when future developments warrant such additional consideration.

JUDGMENT

(Filed January 5, 1956)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that this cause be and the same is hereby remanded to the District Court with instructions to retain jurisdiction, and after prompt notice to the parties and opportunity for hearing, to frame a decree which will provide for the immediate admittance to school on a non-segregated basis of school age Negro children not now in any Hillsboro public school, and which will further provide for the end of all racial segregation in the Hillsboro public schools on or before the commencement of the school year in September, 1956.

ORDER DENYING REHEARING

(Filed January 31, 1956)

The petition for rehearing is denied.

Judge Miller thinks that the petition for rehearing should be granted.